



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Leigh Instruments, Ltd.

File: B-233642

Date: February 13, 1989

DIGEST

General Accounting Office will not consider protest that protester lost the competition because competitor failed to deliver a technical data package to protester in a timely manner as specified by a private contract between the parties and that the price quoted by competitor for materials was higher than that quoted by the competitor to the government in contravention of the same private contract. Since the government had no part in the competitor's actions or the protester's business decisions, the matter essentially involves a dispute between private parties, and therefore is not a matter to be resolved through the bid protest process.

DECISION

Leigh Instruments, Ltd. protests the award of a contract to SLI Avionic Systems Corporation under request for proposals (RFP) No. N00383-88-R-4361, issued by the Department of Navy for the acquisition of components of the stores management system (SMS) for military aircraft. The SMS enables an aircraft to fire its guns and missiles and to release its bombs. Leigh principally alleges that SLI failed to timely furnish it with a technical data package for the SMS that Leigh needed to competitively price its proposal.

We dismiss the protest.

The RFP was issued August 3, 1988, with a closing date of September 2. The agency did not possess sufficiently complete technical data to allow full and open competition. The "Justification for Other than Full and Open Competition" anticipated competition between Leigh, a second source developed by the agency, and SLI, the sole-source incumbent, based on the assumption that SLI would provide necessary technical data, list of approved sources, and assistance to Leigh to permit performance. (Previously, Leigh had been a subcontractor of SLI for this requirement.) Proposals were

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received and, subsequently, best and final offers (BAFOs) were submitted by Leigh and SLI on September 22. The Navy made award to SLI as the low offeror on November 8. This protest was filed with our Office on November 18.

Leigh asserts that several months before the initial closing date, it had entered into a private contract with SLI for the supply of a technical data package which would enable Leigh to purchase certain materials directly from original sources (other than SLI), which would have allowed Leigh to submit a lower priced proposal to the Navy. SLI, however, failed to deliver the data package in a timely manner, and consequently Leigh was forced to prepare material costs in its proposal based on a price quotation from SLI as a sole-source supplier of the materials.^{1/} Leigh also states that, after award, it discovered that the price SLI quoted Leigh for the materials was higher than the price that SLI had quoted to the government for the same materials. Leigh therefore requests that the agency either request a second round of BAFOs or resolicit the requirement. Leigh only received the data package from SLI on October 28, more than a month after it submitted its BAFO.

We will not consider the protest. Clearly, the government had no part in SLI's actions or in Leigh's decision to rely on a private contract with a competitor in determining its proposed pricing. See Blair Electrical Construction, Inc., B-225582.2, Jan. 13, 1987, 87-1 CPD ¶ 55. As such, the matter involves a dispute between private parties for

^{1/} According to Leigh, its private contract with SLI also provided that prices of items purchased directly from SLI could be no higher than prices quoted by SLI to the Navy. The record does not support this allegation.

resolution through litigation, not the bid protest process. 2/ Id.

We note that in its comments filed January 12, 1989, the protester, for the first time, suggests that the agency had a duty to assure that SLI provide the data package to Leigh. This argument is untimely raised since the protester knew by the closing date for receipt of initial proposals and, at the latest, by the closing date for receipt of BAFOs that the agency had failed to assure delivery of the technical data package by SLI. See 4 C.F.R. § 21.2(a)(2) (1988). In this regard, protests based upon other than alleged improprieties in a solicitation must be filed not later than 10 working days after the basis of protest is known or should have been known. Id. Yet, this argument was raised for the first time more than three months after the date for receipt of BAFOs and more than two months after Leigh received the data package.

The protest is dismissed.

Michael R. Isolden
for
Ronald Berger
Associate General Counsel

2/ In its protest, Leigh argues that SLI violated 10 U.S.C. § 2402 (Supp. IV 1986), "Prohibition of contractors limiting subcontractor sales directly to the United States." We do not think that this statute is relevant to the protest. This statute merely provides that Department of Defense contracts shall contain specified language prohibiting contractors from limiting subcontractor sales to the United States. Leigh's protest does not allege that any contract, including the one awarded to SLI under this RFP, did not contain the required language, nor does it allege that Leigh is a subcontractor to SLI for the purposes of this procurement as contemplated by the statute.